Supreme Court, U.S.
FILED
AUG

No. 01-1

IN THE

Supreme Court of the United States

BRIDGESTONE/FIRESTONE, INC.,

Petitioner,

v.

POLYMER INDUSTRIAL PRODUCTS COMPANY
and POLYMER ENTERPRISES CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondents Polymer Industrial Products Company and Polymer Enterprises Corp. are wholly owned by Polymer Enterprises, Inc.

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INTRODUCTION

Neither of Firestone's principal issues was preserved properly in the proceedings below. Firestone's petition should be denied on that ground alone.

First, although Firestone complains about the claim construction, Firestone *expressly agreed* to the claim construction determined by the District Court. Furthermore, that claim construction was embodied in a jury instruction to which Firestone did not object. Although it need not have reached the issue, the Federal Circuit nevertheless reviewed the claim construction *de novo* and affirmed it as correct.

Second, although Firestone seeks a new trial because of a supposedly erroneous jury instruction on "willfulness," the alleged objectionable language in the instruction was urged upon the District Court by Firestone itself, and thus, if erroneous at all, would be "invited error" upon which Firestone cannot obtain reversal.

ISSUES OF CLAIM CONSTRUCTION WERE NOT PRESERVED

Firestone argues that if the '331 patent was interpreted under a supposedly "conflicting" line of Federal Circuit cases, the claim construction "would have yielded a different result in this case." Pet. at 13. It contends that "abrading" references in the specification of the '331 patent should limit claim 1 to an abraded bladder. *Id.* at 5-6.

After a two week jury trial and an adverse verdict, in its JMOL motion for the first time Firestone argued that claim 1 of the '331 patent included an "abrading step" as

"an essential limitation," and that the District Court erred in its claim construction. "Abrading" is the removal of excess rubber. Firestone argues here that claim 1 "required the effect of abrading. . . ." Pet. at 5-6. However, Firestone advocated a different claim construction at trial — one that did not include abrading as an element of claim 1; it sought a new construction only after it lost. In its Petition, Firestone acknowledges the lateness of its "abrading" argument by stating that it asserted this position "in its post-trial and appellate argument," tacitly admitting that it was not asserted at trial, which it was not. Pet. at 5.

The District Court construed the claim on cross-motions for summary judgment: "[n]either the word abrasion, nor the concept, appears in the language of claim 1. . . . Abrasion is not an element of claim 1." A7084. Firestone *agreed* with that claim construction, stating in its March 1997 Objections in Part to the denial of its summary judgment motion that "abrasion is not necessary under claim 1." A7105. Moreover, Firestone did *not* object to the jury instruction construing the claim, which stated "Claim 1 . . . does not include (1) abrasion of the rubber coating. . . ." A3301.[1]

After it lost at trial, however, Firestone took the position in its post trial and appellate brief and at oral argument on appeal that abrasion *was* a required element of claim 1. *See* BFI Fed. Cir. Brf. at 24. In PIPCO's Federal Circuit Opening Brief at 11, PIPCO raised Firestone's waiver of its "abrading" claim construction argument.

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1. Firestone argued for the first time in its JMOL Motion that "the jury should have been instructed that abrading was an element of the claims." A6664.

The tactic of changing position regarding claim construction was *admonished strongly* by the Federal Circuit in *Key Pharmaceuticals v. Hercon Laboratories Corp.*, 161 F.3d 709 (Fed. Cir. 1998): "The impropriety of asserting a position which the trial court adopts and then complaining about it on appeal should be obvious on its face, and litigants hardly need warning not to engage in such conduct." *Id.* at 715. The *Key Pharmaceuticals* court stated that the Federal Circuit would "publicly condemn this behavior." *Id.* at 716. Unlike the appellant in *Key Pharmaceuticals*, Firestone cannot claim it had no notice of the Federal Circuit's condemnation — one of the same attorneys who appeared for the admonished appellant in *Key Pharmaceuticals*, Mr. Castinias, also appeared for Firestone in the Federal Circuit Court of Appeals, employing the same tactics denounced in *Key Pharmaceuticals*.

Firestone's about-face from its "abrading is not necessary" statement was so complete that in its appellate brief it argued that abrading was actually the "basic teaching" of the '331 patent! BFI Fed. Cir. Brf. at 24. This showed unabashed temerity, which is now compounded by Firestone's Petition for Certiorari on this issue. It is not legitimate advocacy.[2]

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2. In rejecting Firestone's construction, the Federal Circuit held that "there is simply no textual support in product claim 1 for an abrading limitation." App. 5a. Further, as was obvious at oral argument in the Federal Circuit, Firestone's empty assertion that abrading was the "only way" to make a bladder with projecting fabric cord (made again here at page 6 of the Petition) was belied not only by the experts at trial, but also by Firestone's own internal memo, written by Firestone's own patent attorney. The memo described a method of keeping excess rubber from "oozing" over the cords, thus making abrading unnecessary. A6180.

Indeed, Firestone was so satisfied with the District Court's claim construction that Firestone argued if summary judgment were not granted to Firestone, *PIPCO* would "seek reversal of the claim construction by the Federal Circuit" and "a *second* trial would be necessary," thus creating a "waste of judicial resources." A7133. Instead, it is Firestone which asked the Federal Circuit, and now asks this Court, to waste judicial resources by undoing six years of litigation and the work of the trial judge, an eight member jury, PIPCO, its management, its employees and its attorneys, because it lost on the claim construction it advocated and embraced, and it now wants a second opportunity to try a different claim construction. Firestone's position is frivolous. This Court should not, by granting certiorari, condone Firestone's conduct.

Firestone also challenges the jury's factual finding that the accused bladders met all the claim elements and had the structure depicted in Figure 3 of the patent. Firestone argues that if the "non-covered" Figure 4 (an illustration of a bladder in the intermediate stage of *manufacturing*, prior to abrading) in the specification was considered, there would have been a "non-infringement finding as a matter of law" because "the accused product *resembled*" Figure 4. Pet. at 5 (emphasis added). However, there was substantial, detailed and scientific evidence, some of which was summarized by the Federal Circuit (App. 7a), supporting the finding that the accused product had projecting, spaced, partially embedded fabric cord and met all the elements of claims 1, 3 and 4. The Federal Circuit correctly perceived Firestone's "Figure 4" argument as just another way of contending that an infringing product must be abraded.

Therefore, because Firestone agreed with the District Court's claim construction which did not require abrading, and because it failed to object to the jury instruction which embodied that claim construction, the claim construction issue has not been preserved for consideration by this Court. Indeed, the Federal Circuit need not have considered the issue at all — it should have strongly admonished Firestone for changing its position and raising the issue as the centerpiece of its appeal.

Moreover, Firestone's conclusory Petition does not demonstrate that the Federal Circuit is "internally conflicted" or that there is any "mysterious hole" in unreported decisions, much less a conflict or "hole" that would have affected the claim construction in this case or denied Firestone equal protection. The "arguably" "contrary line" of cases it cites (Pet. at 11-12) is consistent with the instant decision and the cases are readily distinguishable from the facts here.

Unlike the specification in the '331 patent, in *SciMed Life Systems, Inc. v. Advanced Cardiovascular Systems, Inc.*, 242 F.3d 1337 (Fed. Cir. 2001), the patent specification *expressly limited all embodiments* of the claimed invention to a coaxial structure in language that the Federal Circuit found to be "broad and unequivocal." *Id.* at 1344. And unlike claim 1 of the '331 patent, which did not mention abrading at all, in *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347 (Fed. Cir. 2001), the scope and meaning of the term "local server computer" in claim 1 of the patent was further defined by the specification, and by statements made during the prosecution history, as an "intermediary computer" that caches. *Id.* at 1353.

Here, in contrast, the Federal Circuit started with the claim language and noted that "claim 1 simply makes no mention of abrading." App. 5a. The Panel examined the specification. It noted that Firestone "makes no attempt to identify specific terms in need of definition." *Id.* The Panel observed that although the specification described abrading as part of the manufacturing process, "it is unclear whether the relevant statements should refer to all of the claims, or only to the process claims." *Id.* Finding the prosecution history as "inconclusive at best," the Federal Circuit concluded that "it would be inappropriate to read an 'abrading' limitation into claim 1. Such a claim construction would improperly and unnecessarily read a limitation from the written description into the claim." *Id.* That holding is completely consistent with the supposed "contrary line" of cases cited by Firestone.

FIRESTONE'S "INVITED ERROR" IN ITS JURY INSTRUCTION LANGUAGE ON WILLFULNESS IS NOT GROUNDS FOR GRANTING ITS PETITION BASED ON DENIAL OF "EQUAL JUSTICE;" THE LOST PROFITS INSTRUCTION WAS REVIEWED.

Firestone argues that the jury instruction on willfulness was in error because it contained an "open-ended list" of factors such as "prolonging litigation," "bad faith" and "litigation misconduct" which "convoluted the law of willfulness with the law of damages-enhancement." *See* Pet. at 6; BFI Fed. Cir. Br. at 56-57. However, the challenged portions of the instruction were from the very language additions *Firestone offered* regarding willfulness. A3398-3400. Firestone failed to preserve this argument and, if the instruction was erroneous at all, it was error invited by Firestone. Thus, this argument too is not properly before this Court.

Firestone sought a new trial on the ground that the willfulness instruction allowed the jury to consider such factors as whether Firestone prolonged the litigation rather than working towards a resolution, and whether Firestone was guilty of "bad faith" behavior. BFI Br. at 56. But this language was part of *Firestone's* proposed instruction, *not PIPCO's*. A3398-3400. In its "Comments" to Plaintiff's Instruction No. 49, Firestone "proposes some additions" to PIPCO's instruction. A3398. Firestone added the following:

> Finally, you may consider whether Firestone unnecessarily prolonged this litigation, and placed obstacles in the way of PIPCO rather than working towards a resolution. In this regard, you may consider whether Firestone is guilty of bad faith behavior in their defense of this litigation. If you find that such behavior occurred, it also supports a finding of willfulness.

A3400. Firestone cited no less than *fourteen cases* in support of its proposed jury instruction language. *Id.* at A3400-3401. The trial court included Firestone's additions *verbatim* in the jury charge. A1014.

Thus, it was Firestone which urged that the jury be instructed that willfulness could involve "prolonging litigation" and "bad faith" in defending the litigation. Any asserted error therefore would be "invited error." *Weinar v. Rollform, Inc.*, 744 F.2d 797, 809 (Fed. Cir. 1984) ("if error had occurred, it would have been 'invited error' and not subject to consideration on appeal"). It is frivolous for Firestone to seek certiorari, and a new trial, based on its own jury instruction language. Although it did not refer to the willfulness instruction specifically, the Federal Circuit

clearly reviewed the District Court's willfulness analysis. App. 9a. Firestone was not entitled to have its own jury instruction language form the basis for a new trial, nor can it now complain credibly that the supposed failure to address this argument denied it "equal justice under law." *Cf.* Pet. at 20.

Finally, it is difficult to fathom why Firestone would even attempt to argue that it was denied "equal justice" because "the Federal Circuit did not address the legal erroneousness of the [lost profits] jury charge." Pet. at 19. The Federal Circuit devoted almost a page of its opinion to analyzing the lost profits instruction. App. 10a. Firestone therefore was not denied "equal justice." Moreover, the Federal Circuit's analysis of the instruction was thorough and correct. The detailed lost profits instruction was directly based on caselaw regarding two supplier markets, and it referenced "but for" causation and Firestone's burden to prove the existence of "non-infringing alternatives." In fact, the Federal Circuit admonished Firestone for "misstat[ing] the law" of lost profits. App. 10a.

CONCLUSION

For the foregoing reasons, Respondents Polymer Industrial Products Company and Polymer Enterprises Corp. respectfully request that the Court deny the Petition for Certiorari by Bridgestone/Firestone, Inc.

Respectfully submitted,

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